

**IN THE COURT OF APPEAL OF THE DEMOCRATIC  
SOCIALIST REPUBLIC OF SRI LANKA**

A.K. Suheibu Alimsha  
(now deceased)  
H.M. Farook  
Both of Nikagolle  
Yatawatta  
Matale  
And another  
Defendant-Appellants

**Case No: CA/810/1994/F**  
**DC Matale Case No: 2943/L**

Vs.

Dobawela Piyadhssi Thero  
Pamunuwe Viharaya  
Walewela  
Matale  
Plaintiff-Respondent

Before: Mahinda Samayawardhena, J.  
Counsel: Nizam Kariyapper, P.C., with M.I.M. Iynullah for the  
Appellants.

Respondent is absent and unrepresented.

Decided on: 02.10.2018

Samayawardhena, J.

The plaintiff instituted this action against the two defendants seeking declaration of title to the land described in the schedule to the plaint, ejectment of the defendants therefrom and damages. The defendants sought for the dismissal of the action. After trial, the learned District Judge entered Judgment for the plaintiff. Hence this appeal by the defendants.

At the argument, the plaintiff-respondent was absent and unrepresented, and learned junior counsel for the defendant-appellants invited the Court to deliver the Judgment on the written submissions already filed of record.

In the said one-page brief written submissions, learned counsel for the appellants seeks to impugn the Judgment of the District Court on two grounds:

- (a) Learned District Judge has not considered the two Deeds produced by the appellants marked 1V1 and 1V2.
- (b) The appellants have prescribed to the land before the Buddhist Temporalities Ordinance came into operation.

The position taken up by the appellants in the District Court is as follows:

*The plaintiff who is the Viharadhipathi of Hunapahure Temple is claiming the paddy field belonging to the temple upon documents marked P2, P3, P5 and P7. There is no dispute that the temple is entitled to the paddy field referred to in those documents. But the question is as to whether the paddy field referred to in P2, P3, P5 and P7 is*

*the very same paddy filed which is in the possession of the defendants and depicted as Lot 1 in Plan marked P4.<sup>1</sup>*

Accordingly, the appellants have admitted the ownership of the land in suit residing with the respondent by virtue of the documents marked P2, P3, P5 and P7; but state that the said land has not been properly identified or not depicted in the Plan prepared for this case marked P4.

I must state that there was no issue raised at the trial regarding identification of the corpus, and therefore the said submission (made before the District Court) on that matter is irrelevant and beside the point.

Having accepted that the respondent is the owner of the land in suit by virtue of the documents marked P2, P3, P5 and P7, the appellants now before this Court state that the learned District Judge has failed to consider the appellants' Deeds marked 1V1 and 1V2.

In the first place, the appellants cannot take up contradictory positions at various stages of the case. They cannot approbate and reprobate, affirm and disaffirm, and blow hot and cold simultaneously. (*Ranasinghe v. Premadharmma [1985] 1 Sri LR 63*)

In any event, Deed 1V1 has been executed in 1904 and 1V2 in 1958. But the respondent's said title documents are anterior to the year 1904 and 1958. P2 is dated 15.05.1857. P3 is dated 11.12.1861. P5 is dated 18.07.1860. P7 Deed has been executed in 1928.

Therefore, the first argument of the appellants fails.

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<sup>1</sup> Vide page 96 of the Brief.

The next argument is on prescription. Section 34 of the Buddhist Temporalities Ordinance, No. 19 of 1931, as amended, reads as follows:

*The case of any claim for the recovery of any property, movable or immovable, belonging or alleged to belong to any temple, or for the assertion of title to any such property, the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance.*

*Provided that this section shall not affect rights acquired prior to the commencement of this Ordinance.*

The fact that the Prescription Ordinance has no application to any property belonging to any temple has been emphasized in many decisions including *Sri Pannaloka Thero v. Jinorasa Thero* (1957) 60 NLR 256, *Waharaka alias Moratota Sobhita Thero v. Amunugama Ratnapala Thero* [1981] 1 Sri LR 201.

There is absolutely no evidence to conclude that the appellants acquired prescriptive rights to the land prior to the year 1931.

Hence the second argument of the appellants also cannot succeed.

Appeal is dismissed without costs.

To avoid any future uncertainty, I must place on record that the respondent is not entitled to the whole land depicted in Plan marked P4, but only to the superimposed portion marked in red lines in the said Plan in extent of 1 Rood and 3 Perches.<sup>2</sup>

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<sup>2</sup> Vide page 73 of the Brief.

Judge of the Court of Appeal